

SERVICE DATE – JULY 12, 2012

SURFACE TRANSPORTATION BOARD

Docket No. FD 35459

V&S RAILWAY, LLC—PETITION FOR DECLARATORY ORDER—
RAILROAD OPERATIONS IN HUTCHINSON, KAN.

Digest:¹ In response to three questions referred to the Board by the United States District Court for the District of Kansas, this decision finds that: (1) V&S Railway is the only rail carrier authorized by the Board to operate on an approximately 5-mile rail line in Reno County, Kan., but it is unclear whether V&S Railway actually acquired the entire line; (2) even if V&S Railway did acquire the entire line as authorized, Hutchinson Salt Company or Hutchinson Transportation Company may operate their own private trains over any portions of the line in which they have an adequate state law property interest, as long as they do not unduly interfere with V&S Railway's common carrier operations; and (3) because no entity has sought or obtained this agency's authority to abandon the line, it remains an active line of railroad.

Decided: July 9, 2012

This case involves a dispute between V&S Railway, LLC (V&S), a Class III rail carrier, and two shippers, Hutchinson Salt Company, Inc. (HSC), and Hutchinson Transportation Company, Inc. (HTC) (collectively, HSC/HTC). The parties are fighting over whether HSC/HTC may conduct private freight rail operations over tracks apparently located entirely within HSC/HTC's own property in Reno County, Kan. The dispute is currently the subject of a lawsuit in the United States District Court for the District of Kansas. In that lawsuit, V&S has argued that HSC/HTC may not conduct these private freight rail operations because V&S has a valid freight rail easement over the disputed tracks and is the only entity with the necessary federal license to conduct common carrier operations over those tracks. Under 28 U.S.C. § 1336(b) and the doctrine of primary jurisdiction, the court has referred the three following questions to the Board (DC Order at 12-13):

1. Is V&S the sole rail carrier authorized to operate on the railroad line between milepost 0.0 and milepost 5.14 in Hutchinson, Reno County, Kansas, and to interchange traffic with Defendant BNSF Railway Company?

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

2. Does HSC and/or HTC have the right to operate on the railroad line and to interchange traffic with Defendant BNSF Railway Company by virtue of the fact that they own part of the real property underlying the railroad line and/or the fact that they claim ownership of some of the tracks and improvements that are part of the railroad line the Board authorized V&S to acquire and operate?
3. Did the Hutchinson & Northern Railway Company or any successor-in-interest abandon the right-of-way on Parcel 1 granted to it by virtue of the 1925 Easement?

As we explain below, we conclude that there is no federal barrier to HSC/HTC providing private freight rail operations over the tracks in question here, assuming that HSC/HTC have an appropriate state law property interest that permits their operations over those tracks. Moreover, although V&S has been granted authority to provide common carrier service and may have a freight rail easement over the portion of the line that crosses HSC/HTC's property (the latter a disputed state property law issue), and thus may be a common carrier over that portion of the line, V&S may not block HSC/HTC from conducting private carriage, unless those private freight rail operations would unreasonably interfere with the ability of V&S to satisfy its common carrier obligation. Such interference does not appear to be possible here, however, because the only shippers located on the disputed track are HSC and HTC, which do not seek common carrier service from V&S. In short, the court should resolve whether HSC/HTC have a state law property interest in the disputed tracks that would permit HSC/HTC to use the tracks to transport their own freight. If they do, then under the facts of this case, federal law administered by this agency would not otherwise prohibit HSC/HTC from engaging in their private carriage.

The pertinent factual and procedural background is outlined below.

BACKGROUND

In 1926, the Hutchinson & Northern Railway Company (HN) acquired authorization from the Board's predecessor agency, the Interstate Commerce Commission (ICC),² to conduct common carrier rail operations on a 4.731-mile rail line in Hutchinson County, Kan. (the Line).³

² In the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803 (1995), Congress abolished the ICC, modified the Interstate Commerce Act, created the Surface Transportation Board (Board), and transferred the ICC's remaining rail regulatory functions to the Board, effective January 1, 1996. ICC precedent now applies to the Board.

³ At that time, the Line did not have any designated mileposts. Between 1980 and 1990, a former employee of HN and HSC designated milepost 0.0 at the easternmost point of the Line and designated subsequent mileposts from east to west. See HSC/HTC and BNSF Railway Company's Response to V&S Railway, LLC's Petition for Declaratory Order (HSC/HTC Response), Verified Statement of Max Liby at 3-4. The Board also notes that there is an unexplained discrepancy between the length of the Line as initially described by the ICC in 1926 (continued...)

Operation of Line by Hutchinson & N. Ry., 111 I.C.C. 403 (1926). The ICC's decision did not mention whether HN acquired the Line under state law in fee simple, or whether it held a railroad easement or other property interest over it.⁴

HSC owns a salt mine and the underlying real estate (Salt Mine Property) at the east end of the Line, which includes the two segments of property (known as "Parcel 1" and "Parcel 10") that are the subject of the current dispute. District Court's Order, filed December 20, 2010 (DC Order), at 3. The Line traverses Parcel 1 and Parcel 10, within the first .5 mile (going east to west, beginning from the end of the Line on Salt Mine Property). Id.; HSC/HTC Response at 13-14. HSC/HTC assert that HSC owns not just the underlying real estate, but also the rail, ties, switches, fixtures, and other improvements on Parcel 1 and Parcel 10. HSC/HTC Response at 8-9, 13-14. HSC/HTC claim that HN's parent company (American Salt Company) sold the Salt Mine Property, including Parcel 1 and Parcel 10 (and the rail and other improvements thereon), to HSC on August 1, 1990. Id. at 8, 15.

According to HSC/HTC, through July 1990, HN provided "switching" service to the salt mine by moving rail cars located on the Salt Mine Property over the Line to an interchange with another rail carrier several miles west of the mine. Id. at 6, 10.⁵ HSC/HTC assert that, beginning in August 1990 (when HSC purchased the Salt Mine Property), they became dissatisfied with HN's switching service. HSC/HTC Response at 10. In 1994, HSC/HTC entered into an agreement with the predecessor to BNSF (The Atchison, Topeka and Santa Fe Railway Company) to have a "spur" track built "on the [Salt Mine Property] running northwesterly so that the tracks located on the [Salt Mine Property] would be connected with BNSF's tracks located immediately to the north of the [Salt Mine Property]." Id. This connection "gave HSC the option to have its rock salt shipped either by the Union Pacific via the [HN], or by the BNSF." Id. at 11. And, "[s]ince 1994, most of HSC/HTC's rail cars were transferred to the BNSF or its predecessor for shipment." Id. HSC/HTC acquired a locomotive in 1995, which they assert has only been used to serve their own needs and to move cars on their own tracks. Id.

(... continued)

(4.731-mile line), and the length of the Line as described by V&S when it sought Board authority in 2006 (5.14-mile line).

⁴ The parties refer to a 1925 easement as providing HN with the right to operate on at least the portions of the Line that appear to be the subject of this dispute. See Petition for Declaratory Order (Pet. for Dec. Order) at 4; HSC/HTC Response at 21 n.4, 25. However, the parties have not provided a copy of this easement to the Board, and the terms of the easement are not specifically set out in the record. To the extent that we discuss this easement herein, we will refer to it as the "1925 Easement."

⁵ It is not clear from the record which rail carrier HN interchanged with on the western part of the Line. HSC/HTC suggests that the Line connects with a Union Pacific Railroad Company (UP) rail line (see HSC/HTC Response, 11), while V&S only refers to a connection with a BNSF Railway Company (BNSF) line. See Pet. for Dec. Order, 3.

In 1998, HSC/HTC and HN entered into an “Operating Rights Agreement,” under which HSC/HTC were permitted to conduct switching operations over 500 feet of the Line beginning at the facility gate and heading west, using HSC/HTC’s own trains and for the sole purpose of serving the Hutchinson Salt Mine facility. *Id.* at 11; Liby V.S. at Ex. A. In the agreement, the 500 feet of the Line is referred to as “Joint Trackage” and described as “contiguous to the tracks of” HSC/HTC. HSC/HTC Response at 11-12; Liby V.S. at Ex. A. The agreement describes the Line as being 5.14 miles long and lists HN as the owner of all 5.14 miles of the Line. Liby V.S. at Ex. A. HSC/HTC claim that the Operating Rights Agreement constitutes an acknowledgement by HN in 1998 that HSC/HTC owned the track on the Salt Mine Property and operated their own trains on the Salt Mine Property track without any objection from HN. HSC/HTC Response at 12.

In 2006, V&S obtained authority from the Board to acquire the Line from HN by quitclaim deed, as well as to operate the Line. V&S Ry.—Acquis. & Operation Exemption—Hutchinson & N. Ry., FD 34875 (STB served May 31, 2006). The request for authority described the Line as extending from milepost 0.0 to milepost 5.14, in Hutchinson, Reno County, Kan. *Id.* According to V&S, the Line includes an interchange with BNSF. Pet. for Dec. Order at 3. V&S asserts that, while HSC/HTC claim ownership of Parcel 1 and Parcel 10, over which the Line runs on the Salt Mine Property, V&S holds a railroad easement across Parcel 1 and “possibly” across Parcel 10. *Id.* at 4 (referring to the 1925 Easement, see *supra* note 4). HSC/HTC, on the other hand, claim that V&S’ claimed easement does not encompass Parcel 10 and that the easement over Parcel 1 “expired by its own terms” prior to 2006 and thus could not have been acquired by V&S in 2006. HSC/HTC Response, 15; Liby V.S. at Ex. A, pp. 10-11.

HSC/HTC claim that, after V&S received its Board authority, V&S provided poor service. HSC/HTC Response at 3. As a result, HSC/HTC have not requested service from V&S for more than three years, and instead have transported their rail cars directly to BNSF over the connecting track that they constructed in 1994 from the Salt Mine Property to BNSF’s line. *Id.*

In March 2007, V&S sent a letter to HSC/HTC requesting that they stop operating on the portions of the Line located on the Salt Mine Property. V&S alleged that, because of its Board authority, V&S was the only entity authorized to conduct rail operations anywhere on the Line. Pet. for Dec. Order at 3; HSC/HTC Response at 12-13. HSC/HTC responded with a letter denying V&S’ assertions. HSC/HTC Response at 13. Subsequently, on December 22, 2008, V&S brought suit against HSC/HTC and BNSF (collectively, Respondents) in federal district court to resolve the matter.⁶ In addition to numerous state property law counts, V&S has argued in its lawsuit that it has the exclusive right to conduct rail operations on the entire Line (including the portion on Parcel 1 and Parcel 10) because of the Board authority it had obtained. Pet. for Dec. Order at 5; Rebuttal of V&S Railway, LLC (V&S Rebuttal) at 6. HSC/HTC argue that, notwithstanding V&S’ Board authority, they can conduct their own private carriage on their own private track traversing Parcel 1 and Parcel 10 (and occasionally use the 500 feet of the Line, as permitted under the Operating Rights Agreement). HSC/HTC Response at 2-3, 22.

⁶ V&S Ry. v. Hutchinson Salt Co., No. 08-1402-WEB (D. Kan.).

By order served on December 20, 2010, the district court granted V&S' Motion to Stay the Case and Refer Certain Issues to the Surface Transportation Board. As discussed above, the court's order referred three specific questions to the Board (DC Order at 12-13).

On December 28, 2010, V&S filed a Petition for a Declaratory Order asking that the Board address the referred questions. By decision served on February 17, 2011, the Board instituted a declaratory order proceeding and granted a petition from the Association of Railway Museums, Inc., and the Tourist Railroad Association, Inc. (collectively, ARM/TRAIN), for leave to intervene. On March 9, 2011, Respondents jointly filed a Response to the Petition. On March 29, 2011, V&S filed a Rebuttal.

We will address the three questions referred by the district court, and, based upon the record before us, grant in part and deny in part the petition for declaratory order, as discussed below.

PRELIMINARY MATTER

On April 12, 2011, Respondents requested leave to file a sur-rebuttal and concurrently filed their sur-rebuttal. On April 19, 2011, V&S replied, requesting that we reject Respondents' sur-rebuttal.

The Board's rules do not permit a reply to a reply. See 49 C.F.R. § 1104.13(c). Respondents have not provided sufficient reason for the Board to make an exception to this rule here. Respondents' sur-rebuttal focuses on the interpretation of the parties' Operating Rights Agreement, which, as explained below, the Board will not address, because such state law contract interpretation generally should be conducted by the district court and not the Board. Respondents' request for leave to file a sur-rebuttal will therefore be denied, and their sur-rebuttal will not be accepted into the record.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. See Boston & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. U.S., 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). Here, we find it appropriate to issue a declaratory order to remove uncertainty with regard to the three questions referred to us.

Respondents argue that the Petition for Declaratory Order should be denied because HSC/HTC are conducting private carriage, not common carriage, and therefore are not common carriers subject to the Board's jurisdiction. HSC/HTC Response at 15-19. However, the Board here is not exercising its jurisdiction over any particular rail operations. Rather, we have been asked to provide guidance regarding the legal status of the Line and which entities may conduct operations on it under the Interstate Commerce Act (IC Act). Such questions involve the "special expertise" of the Board and "impact the uniformity of the regulated field" under the IC

Act, and thus are within the Board's exclusive and primary jurisdiction to decide. DeBruce Grain, Inc. v. Union Pac. R.R., 149 F.3d 787, 789 (8th Cir. 1998). Therefore, the Board rejects Respondents' request to deny the V&S Petition on this ground.

Respondents also assert that the Board should deny the Petition for Declaratory Order because V&S did not include any verified evidence with its Petition. HSC/HTC Response, 1. The Board's rules, however, do not require that verified evidence be submitted with a petition for declaratory order. See 49 C.F.R. § 1104.4(a) and § 1117.1. Moreover, the three questions referred from the district court primarily center on legal issues concerning the status of the Line under the IC Act. Therefore, it is appropriate for the Board to provide guidance on these legal issues. We will now address the three questions the district court referred to us.

I. Is V&S the sole rail carrier authorized to operate on the railroad line between milepost 0.0 and milepost 5.14 in Hutchinson, Reno County, Kansas, and to interchange traffic with Defendant BNSF Railway Company?

As noted above, HN obtained ICC authority to operate over the Line as a rail carrier⁷ in 1926 and subsequently provided service over the Line. In 2006, V&S obtained Board authority to acquire the Line from HN and operate it and, according to V&S, acquired by quitclaim deed all of HN's then-existing interest in the Line.⁸ Neither party has provided any information indicating that any other entity has received agency authority to acquire or operate the Line as a rail common carrier. Thus, today V&S is the only entity *authorized* to provide common carrier service over the Line or interchange traffic as a rail carrier with any other rail carrier.

That conclusion, however, does not end the inquiry regarding whether it is V&S or HSC/HTC (or both) that can lawfully conduct rail operations over the portion of the Line that traverses the Salt Mine Property, for several reasons.

First, despite holding Board authority to acquire the Line, it is not clear that V&S exercised that authority with respect to the portion of the Line that traverses the Salt Mine Property. That is because Board (or ICC) authority alone does not guarantee that a rail common carrier has the right to acquire and operate a line of railroad. The Board's (or the ICC's) grant of authority is permissive only. To exercise that authority, the carrier must complete the acquisition by obtaining the necessary rights under state property and/or contract law to initiate the proposed rail operations on the line.⁹ Where, as here, there is a dispute about whether an entity has

⁷ A "rail carrier" is "a person providing common carrier railroad transportation for compensation" 49 U.S.C. § 10102(5).

⁸ As discussed further below, the parties dispute the extent of the state law property interest that V&S acquired from HN, and the court is the proper tribunal to decide that issue.

⁹ See Middletown & N.J. R.R.—Lease & Operation Exemption—Norfolk S. Ry., FD 35412, slip op. at 4 (STB served Sept. 23, 2011) (entity became a rail carrier when it acquired a line of railroad pursuant to the Board's authorization of that acquisition). Typically, a
(continued...)

exercised its agency authority by acquiring a property interest in a line of railroad, the dispute generally should be decided by a court, applying state law, and not the Board. See Gen. Ry., d/b/a Iowa N.W. R.R.—Exemption for Acquis. of R.R. Line—In Osceola & Dickinson Cntys., Iowa, FD 34867, slip op. at 4 (STB served June 15, 2007) (noting that state courts are the proper venue for resolving contract and property disputes and that the Board’s grant of authority “is permissive, not mandatory, and is not dispositive of ownership of the Line”); San Francisco Bay R.R.—Mare Island—Operation Exemption—Cal. N. R.R., FD 35304 (STB served Dec. 6, 2010) (voiding authority to operate a rail line where noncarrier filed misleading information concerning ownership of the property over which it sought to operate).

Here, the parties do not dispute that following the Board’s grant of authority in 2006 to V&S to acquire and operate the Line, V&S obtained from HN an adequate property interest under state law, via quitclaim deed, to conduct common carrier operations on the portion of the Line outside the Salt Mine Property. What appears uncertain, however, is whether V&S acquired from HN a property interest in the portion of the Line that traverses the Salt Mine Property or, alternatively, whether that property interest previously had been transferred from HN’s parent company to HSC in 1990. V&S implies that the 1925 Easement continues to be in effect and allows V&S access to the tracks traversing Parcel 1 and “possibly” Parcel 10. Pet. for Dec. Order at 4. HSC/HTC assert, on the other hand, that HSC acquired the entire state law property interest for the section of the Line that traverses Parcel 1 and Parcel 10 of the Salt Mine Property (the underlying real estate *and* the tracks) in 1990 from HN’s parent company. HSC/HTC Response at 13-15, 21-23.

We decline to address this state property law issue. The question of parties’ respective property rights under state law generally should be decided by the district court applying state property and contract law. See Lackawanna Cnty. R.R. Auth.—Acquis. Exemption—F&L Realty, Inc., FD 33905, slip op. at 6 (STB served Oct. 22, 2001); Gen. Ry. Corp., slip op. at 4; see also Allegheny Valley R.R.—Pet. for Declaratory Order—William Fiore, FD 35388 (STB served Apr. 25, 2011) (questions concerning size, location, and nature of property rights are best addressed by a state court).¹⁰

The district court’s determination of the respective property rights of the parties will inform the Board’s determination of which party has a common carrier obligation over the portion of the Line that traverses the Salt Mine Property. Should the district court find that the 1925 Easement remains in effect as to the portion of the Line that traverses the Salt Mine Property and that HSC merely purchased the Salt Mine Property subject to the easement (and that V&S therefore acquired from HN a property interest in the easement via the 2006 quitclaim deed), then V&S would be the rail carrier authorized by the Board to operate over the entire Line, including the portion on the Salt Mine Property, and may provide common carrier service

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rail carrier acquiring an existing line will acquire all or part of the rail line in fee or will acquire an easement allowing for rail operations on the line.

¹⁰ The parties appear to agree that the district court, and not the Board, should decide any state property law issues. See V&S Rebuttal at 11; HSC/HTC Response at 25.

on the entirety of the Line without undue interference. If, on the other hand, the district court finds that HSC possesses an exclusive property interest in the Salt Mine Property (*i.e.*, that V&S did not acquire any property interest over the portion of the Line that traverses the Salt Mine Property through the quitclaim deed from HN in 2006), then that would mean that HSC itself acquired that portion of the Line (along with the rest of the Salt Mine Property) from HN's parent in 1990 (albeit without ICC authority), as well as the common carrier obligation attached to the Line,¹¹ and HSC would be required to seek after-the-fact Board authority for that acquisition.¹² Upon receiving the Board's authorization, HSC could then petition to revoke, in part, V&S' 2006 exemption to the extent the exemption authorized V&S to acquire and operate over the portions of the Line owned by HSC and operated by HSC/HTC. Alternatively, upon receiving the Board's authorization, HSC may seek authority to abandon the line under 49 U.S.C. § 10903.

Second, HSC/HTC may be able to operate trains over any of the disputed track that consists of private track—*i.e.*, track that is separate from the Line and is not part of the national transportation system. When an entity conducts private carriage on its own private track, such track is not a rail line subject to the Board's jurisdiction. Private track is "typically built and maintained by a shipper (or for a shipper at the shipper's expense) and operated by the shipper (or its contractor) to serve only that shipper, moving the shipper's own goods, so that there is no 'holding out' to serve other shippers for compensation." B. Willis, C.P.A., Inc.—Petition for Declaratory Order, FD 34013, slip op. at 2 (STB served Oct. 3, 2001), *aff'd*, 51 Fed. Appx. 321 (D.C. Cir 2002). Private track is not considered part of the national rail system even if a common carrier operates on the track, as long as the common carrier "operates on the private track exclusively to serve the owner of the track pursuant to a contractual arrangement with that owner." Devens Recycling Ctr., LLC—Petition for Declaratory Order, FD 34952, slip op. 2 (STB served Jan. 10, 2007).

Here, HSC/HTC assert that they are conducting purely private rail operations (carrying their own goods and not holding out to serve other shippers) on their own private track located entirely on their Salt Mine Property (including on Parcel 1 and Parcel 10). HSC/HTC Response at 18-22. It is clear that the tracks that were built in 1994 at HSC/HTC's direction to connect the Salt Mine Property to BNSF's rail line are private tracks and are not part of the Line over which

¹¹ There is no evidence in the record demonstrating that HSC sought ICC approval of the acquisition of the section of the Line that traverses Parcel 1 and Parcel 10 in 1990.

¹² See, e.g., Georgia Dep't of Transp.—Acquis. Exemption—CSX Transp., Inc., FD 35591 (STB served Feb. 27, 2012) (GaDOT) (seeking after-the-fact authority to acquire an active, but presently unused, line of railroad purchased from a rail carrier several years earlier). While circumstances, on occasion, may require a party to seek after-the-fact authority from the Board, we note that parties are expected to comply with statutory and regulatory deadlines on a timely basis.

V&S has authority to operate.¹³ The record shows that HSC/HTC have operated over those private tracks, moving rail cars filled with their own goods (salt) to the connection with BNSF, and maintained those tracks, since they were built. HSC/HTC Response at 10-11, 21-22. HSC/HTC do not hold themselves out to provide common carrier service on these private tracks (or on any of the tracks located on the Salt Mine Property). *Id.* at 17. Nor in its Rebuttal does V&S argue that these tracks should somehow be considered to be part of the Line. Therefore, we find that the tracks constructed in 1994 to connect the Salt Mine Property to the BNSF line are private track, owned and operated by HSC/HTC, and are not part of the Line.

However, the question of whether the tracks on Parcel 1 and Parcel 10, which appear to be at the heart of the parties' dispute, are private track or part of the Line is more difficult to discern. The parties appear to dispute whether portions of the track located on Parcel 1 and Parcel 10 were ever part of the Line. Compare HSC/HTC Response at 13-14 (describing the disputed track on Parcel 1 and Parcel 10 and stating that some of the track is not covered by V&S' claimed 1925 Easement), with Pet. for Dec. Order at 3-5 (claiming HSC/HTC are operating on the Line) and V&S Rebuttal at 9-10 (suggesting that the Line possibly extends onto property owned by HSC/HTC). Assuming, however, that at least some portions of the Line do extend onto Parcel 1 and/or Parcel 10, then those sections cannot be private track because once track becomes a line of railroad subject to the Board's jurisdiction, as the Line did, it cannot become private track unless and until the Board authorizes its abandonment and the abandonment is consummated. See City of Creede, Colo.—Petition for Declaratory Order, FD 34376, slip op. at 8 (STB served May 3, 2005); see also Atchison, Topeka & Santa Fe Ry.—Aban. Exemption—in Lyon Cnty., Kan., AB 52 (Sub-No. 71X), slip op. at 4 (ICC served June 17, 1991) (Lyon County). Here, the Board is not aware of any abandonments having been authorized on the Line. Neither side has proven its claim as to the status of the track on Parcel 1 and Parcel 10, and although we could hold further proceedings on that matter, we will not do so here because HSC/HTC may be able to operate over those parcels for other reasons explained below.

Third, even if the district court finds that V&S exercised its acquisition authority by obtaining a property interest in the portion of the Line that traverses the Salt Mine Property (in which case, it became a common carrier with respect to that portion of the Line), V&S and HSC/HTC could both have the right to operate trains over that track, because a grant of ICC or STB authority to operate on a rail line as a common carrier does not mean that the common

¹³ HSC/HTC describes these tracks as a “spur” connection to BNSF's line. HSC/HTC Response at 10-11, 21-22. These tracks should be more accurately referred to as private track. “Spur” track refers to connecting, switching, or other ancillary track owned or operated by a common carrier that is intended to improve the facilities serving shippers on an existing rail line, and not intended to extend the rail line into new territory. See Indiana R.R.—Petition for Declaratory Order, FD 35181, slip op. at 2 (STB served Apr. 14, 2009). Spur track is within the Board's jurisdiction, but is not subject to the Board's licensing authority. See 49 U.S.C. § 10906.

carrier necessarily has exclusive use of the rail line.¹⁴ The agency has found that a noncarrier may conduct private carriage on a common carrier rail line where the private carrier is transporting its own goods, not holding itself out to provide service for compensation, and not unduly interfering with the common carrier's operations on the line. See S.D. Warren Co. d/b/a Sappi Fine Paper N.A.—Acquis. & Operation Exemption—Maine Cent. R.R., FD 34133, slip op. at 2 (STB served Sept. 30, 2002) (finding private carriage not to be the operations of a “rail carrier” under the current definition in 49 U.S.C. § 10102, and therefore, outside the Board’s jurisdiction); Bhd. of Locomotive Eng’rs v. Interstate R.R., FD 31078 (ICC served Nov. 20, 1987) (BLE) (explaining that operations at issue were not those of a “rail carrier” under the definition contained in 49 U.S.C. § 10102 at that time); see also Boeing Co.—Acquis. & Operation Exemption—Chehalis W. Ry., FD 31916 (ICC served Oct. 10, 1991) (following BLE).

Here, HSC/HTC assert that because they are only conducting private carriage (carrying their own goods and not offering common carrier service), consistent with the above precedents, they may conduct their private rail operations on the Line, even though a common carrier may have Board authority to operate on it. HSC/HTC Response at 2-3, 19-23.¹⁵ V&S initially argued that “private rail operations [can only be] conducted over private track.” Pet. for Dec. Order at 3 (purporting to quote from Devens Recycling Center, as discussed further below). On rebuttal, V&S suggests instead that private carriage can take place on a common carrier rail line, but only if the private carrier has the consent of the common carrier. V&S Rebuttal at 5.

V&S’ initial argument is incorrect—agency precedent does not hold that “private rail operations [can only be] conducted over private track.” Pet. for Dec. Order at 3. As noted, the Board and the ICC have allowed private rail operations to be conducted on common carrier track. See S.D. Warren; Boeing; BLE. Moreover, the original grant of authority to V&S’ predecessor (HN) to operate common carrier service on the Line specifically recognizes that

¹⁴ V&S has asserted that it has exclusive use of the tracks that make up the Line because the Board authorized it to operate as a common carrier on the Line. In support of its argument, V&S cites to several cases under the agency’s State of Maine doctrine, see Maine—Dep’t of Transp.—Acquis. & Operation Exemption—Me. Cent. R.R., 8 I.C.C.2d 835 (1991). See Pet. for Dec. Order at 5-6; V&S Rebuttal at 9-10. In these State of Maine cases, the Board has required the common carrier on the rail line at issue to maintain a permanent and “exclusive” easement to conduct common carrier operations on that rail line when the underlying rail assets are sold to a noncarrier. When the Board uses the word “exclusive” in that context, it intends it to mean that the carrier holding the easement will remain as the exclusive common carrier for that rail line, at least vis-à-vis the noncarrier acquiring the underlying rail assets. The use of the word “exclusive” in that context does not mean that the noncarrier acquiring the underlying rail assets may not run trains on the rail line. To the contrary, one of the reasons for entering into a State of Maine-type transaction is to permit a noncarrier to conduct non-common carrier rail operations on the rail line (for example, commuter rail operations).

¹⁵ This assumes, of course, that part of the Line does extend onto Parcel 1 or Parcel 10.

other types of rail service may be conducted on the Line.¹⁶ Devens Recycling Center, cited and quoted by V&S, is not to the contrary. That decision states: “The agency’s jurisdiction, however, does not extend to wholly *private rail operations conducted over private track . . .*” even where a common carrier conducts those operations pursuant to the contract with a shipper. FD 34952, slip op. at 2 (emphasis added). V&S modified the quotation to read that “private rail operations [can only be] conducted over private track.” This clearly changes the meaning of the clause into a proposition not supported by the Devens Recycling Center decision or any other Board or ICC decision.¹⁷

V&S’ revised argument that private carriage can only take place on a common carrier rail line when the common carrier consents to such private rail traffic (V&S Rebuttal at 5) is also incorrect as an absolute proposition. If the common carrier possesses an exclusive property interest in the rail line under state law, then any private carrier would need the consent of the common carrier to conduct private carriage on that line (through some form of contractual agreement entered into under state law).¹⁸

Here, however, private shippers (HSC/HTC) claim that they own the disputed track on Parcel 1 and Parcel 10. If that is the case under state law, there is nothing in the IC Act that would require HSC/HTC to obtain the consent of V&S to conduct private carriage on that part of the Line (if the Line indeed does extend onto those parcels), as long as HSC/HTC do not unduly interfere with V&S’ ability to meet its common carrier obligation, if any,¹⁹ on the Line. In other

¹⁶ The ICC’s decision to authorize HN’s operation of the Line states: “While the applicant has requested authority in this proceeding to operate its railroad in interstate freight traffic only, it is to be understood that passenger and other service may be furnished thereon without further authority from us.” 111 I.C.C. at 404.

¹⁷ The Board admonishes V&S and its counsel for this intentional misrepresentation of the law. ARM/TRAIN intervened in this case solely to comment on V&S’ erroneous quotation, as they were concerned that the operations of their members might be affected if the Board agreed with V&S’ version of that quotation. We believe that ARM/TRAIN’s concerns have been resolved by our disavowal of V&S’ false and misleading restatement of language in Devens Recycling Center.

¹⁸ In this case, HSC/HTC obtained the consent of V&S’ predecessor (HN), through the Operating Rights Agreement, to use of 500 feet of track owned by HN (now V&S) to the west of Parcel 1 and Parcel 10. See HSC/HTC Response, Liby V.S., Ex. A. V&S questions whether the Operating Rights Agreement was properly transferred from HN to it. V&S Rebuttal at 5-6. HSC/HTC argue that the agreement continues to be in effect and demonstrates that HN acknowledged that HSC/HTC owned the track on the Salt Mine Property (including Parcel 1 and Parcel 10) in 1998. Issues concerning the continued validity or effect of the Operating Rights Agreement on the current dispute should be resolved by the district court, applying state law. Lackawanna, slip op. at 6; Gen. Ry. Corp., slip op. at 4.

¹⁹ As discussed above, it is unclear whether V&S actually acquired, and thus obtained a common carrier obligation over, the portion of the Line that traverses the Salt Mine Property.

words, HSC/HTC can carry their own goods (and not hold themselves out as providing freight carriage services for hire) on tracks that they own, even if those tracks are part of the common carrier line, without the consent of the common carrier, as long as HSC/HTC do not unduly interfere with the common carrier operations on the Line.

V&S argues that the BLE, Boeing, and S.D. Warren decisions support its consent-requirement argument. Those decisions do not support V&S' position. In each of those cases, the common carrier owned the line at issue, and the parties had reached agreements allowing the shipper to conduct its private carriage on the line. See S.D. Warren, slip op. at 1; Boeing, slip op. at 1; BLE, slip op. at 1. The decisions do not state that an entity must always obtain the consent of the common carrier to conduct private carriage on rail lines that are part of the interstate rail system. The agency merely noted that, under the facts and circumstances of those particular cases, the parties had indeed entered into consensual agreements allowing the private carriage on the common carrier owned line. Under the IC Act, the concern is whether the common carrier rights and obligations on the rail line may be unduly interfered with, not which party may possess a contractual right to use a rail line for private carriage. See 49 U.S.C. § 11101.

Here, HSC/HTC claim that their private operations on Parcel 1 and Parcel 10 do not unduly interfere with V&S' common carrier operations on the Line for several reasons. HSC/HTC Response at 20, 22-23. First, they note that the disputed track on Parcel 1 and Parcel 10 is located on the Salt Mine Property, and that the Line apparently ends on the Salt Mine Property or at the boundary of the Salt Mine Property (the western edge of Parcel 1 and Parcel 10). See id. at 13-14, 20. Second, they explain that the disputed track on Parcel 1 and Parcel 10 only serves HSC/HTC – there are no other shippers on the Salt Mine Property, or on the disputed portions of track. Id. at 22-23. Lastly, they state that V&S has not operated on the disputed track for at least the last three years, as HSC/HTC have not requested any service from V&S during that time. Id. Thus, their position is that there are no common carrier operations over the Line with which they could interfere.

V&S does not argue that HSC/HTC's private carriage on the Line currently unduly interferes with its common carrier operations. V&S' sole response to HSC/HTC's arguments is that the only reason there is no interference with its common carrier operations is because HSC/HTC refuse to request service from V&S and tender their traffic to it. V&S Rebuttal at 8. Thus, V&S implies that HSC/HTC's private carriage would unduly interfere with V&S' common carrier operations, if HSC/HTC would request service from V&S. However, V&S' position presupposes that HSC/HTC must use V&S to ship their goods on the Line—and thus rests on circular reasoning. As we have explained, if HSC/HTC have a state law property interest in the track on Parcel 1 and Parcel 10, they may conduct private carriage on that track, even if it is part of the Line, as long as they do not unduly interfere with V&S' common carrier operations, if any. Nothing in the IC Act requires HSC/HTC to use V&S' common carrier

service to ship HSC/HTC's own goods on any portion of the Line that HSC/HTC may own or have the right to use under state law.²⁰

In short, even if V&S is the common carrier over the portion of the Line that traverses the Salt Mine Property, because the Line ends on or at the edge of the Salt Mine Property, there are no other shippers on that end of the Line, and V&S has not shown that its common carrier operations are being or may be unduly interfered with, HSC/HTC may continue to perform private carriage on those portions of the Line that they own or have a right to use under state law, as long as their operations continue to refrain from unduly interfering with V&S' common carrier operations.²¹

II. Does HSC and/or HTC have the right to operate on the railroad line and to interchange traffic with Defendant BNSF Railway Company by virtue of the fact that they own part of the real property underlying the railroad line and/or the fact that they claim ownership of some of the tracks and improvements that are part of the railroad line the Board authorized V&S to acquire and operate?

As explained above, HSC/HTC have the right to perform private carriage on those portions of the disputed tracks (located on Parcel 1 and Parcel 10), which may be part of the Line, as long as HSC/HTC: (1) have a valid state law property interest permitting the operations (either through fee ownership, easement, or other contractual agreement) and (2) are not unduly interfering with V&S' obligation, if any, to provide common carrier service on the Line on reasonable request. See S.D. Warren, slip op. at 2; Lackawanna, slip op. at 6.²²

²⁰ V&S suggests that allowing HSC/HTC to conduct private carriage on the disputed portion of the Line without V&S' consent "would allow every shipper in the country to operate on the lines of railroad serving its facility simply by withholding its traffic so as not to interfere with the nonexistent operations of the railroad." V&S Rebuttal at 8. However, that is not the case. V&S fails to distinguish between the unusual situation presented here, where shippers are performing private carriage on track that they claim to own (which also may be part of a common carrier line), and the more usual situation where the common carrier owns the rail line (or has a state law property interest in the line, such as an exclusive easement) and is also conducting common carrier operations thereon.

²¹ We note that in the State of Maine cases cited by V&S (see, e.g., Pet. for Dec. Order at 5-6; V&S Rebuttal at 9-10), the agency has generally required that the parties agree to a permanent easement in order to preserve the common carrier's rights and obligations on the rail line. However, the particular facts and circumstances of this case provide reasonable assurance that there will likely be no undue interference with V&S' common carrier rights and obligations with regard to the disputed portion of the Line.

²² As noted above, the question of which party or parties have a valid property or contractual interest in the disputed tracks is generally a question for the district court to decide, and not the Board. Id.

As to whether HSC/HTC can tender and receive rail cars to and from BNSF, as explained above, the Board finds that HSC/HTC can perform private carriage on their own private track that connects with BNSF, which was built at their request in 1994. If HSC/HTC must traverse portions of the disputed track (on Parcel 1 and Parcel 10) to reach this private track, they may do so, assuming they have a state law property interest in the disputed track and as long as they do not unduly interfere with V&S' common carrier obligation, if any. Moreover, if there is an additional interchange connection with BNSF on the western portion of the Line (over which all parties appear to agree that only V&S has the right to operate), HSC/HTC cannot reach that interchange without V&S' consent, as HSC/HTC have no property rights that would allow them to operate on that portion of the Line.

III. Did the Hutchinson & Northern Railway Company or any successor-in-interest abandon the right-of-way on Parcel 1 granted to it by virtue of the 1925 Easement?

Although it appears that HSC/HTC have claimed in the district court proceeding that HN abandoned the portion of the Line located on Parcel 1,²³ no party has made that assertion to the Board. Rather, V&S asserts that neither HN nor any successor-in-interest to HN abandoned any segment of the Line,²⁴ and HSC/HTC state that no party has sought a formal abandonment determination from the agency.²⁵

As discussed above, once a track has become a line of railroad subject to the Board's jurisdiction, the property remains a line of railroad in the national rail system subject to full agency regulation until the Board grants abandonment authority and that authority is consummated. 49 U.S.C. § 10903, 10501(b); City of Creede, slip op. at 8; see also Lyon County, slip op. at 4. The entire Line was operated by HN as a line of railroad as authorized by the ICC in 1926. The Board is not aware of any abandonment having been authorized by the ICC or the Board for any portion of the Line. Therefore, the entire Line, including any portion of the Line that traverses Parcel 1 and Parcel 10, remains a line of railroad subject to Board jurisdiction.

In summary, based on the particular facts and circumstances presented to us, we find that, first, V&S is the sole carrier holding Board authority to operate on the Line. Whether V&S exercised that authority with respect to the portions of the Line that traverse the Salt Mine Property (and thus whether V&S is a rail carrier with respect to those portions of the Line), however, depends upon whether the court finds that V&S acquired a property interest from HN in 2006 that would allow it to do so. If it did not—i.e., if HSC acquired the entire property interest in Parcels 1 and 10 in 1990, leaving no property interest for V&S to acquire under the 2006 quitclaim deed—then it is HSC, not V&S, that acquired that portion of the Line and holds the common carrier obligation over it and must obtain Board authority for that acquisition after the fact. Second, HSC/HTC, however, may continue to perform private carriage over the private track they own and on those portions of the Line in which they have a valid property interest

²³ See DC Order at 4.

²⁴ Pet. for Dec. Order at 6.

²⁵ HSC/HTC Response at 24-25.

under state law (e.g., ownership of the track) even if V&S holds a rail easement and is therefore a common carrier on those portions of the Line, as it has not been shown that HSC/HTC's private operations are unreasonably interfering with any common carrier obligation of V&S. Third, neither HN nor any successor-in-interest to HN has been authorized by this agency to abandon any portion of the Line, and the Line in its entirety (including the portion that traverses the Salt Mine Property) remains a line of railroad subject to the Board's jurisdiction.

It is ordered:

1. Respondents' petition for leave to file a sur-rebuttal is denied.
2. The petition for declaratory order is granted in part and denied in part, as discussed above.
3. This decision is effective on its date of service.
4. A copy of this decision will be served on:

The Honorable Monti L. Belot
United States Senior District Judge
United States District Court for the District of Kansas
U.S. Courthouse
401 North Market Street, Suite 111
Wichita, KS 67202

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.